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IN THE

Supreme Court of the United States

STATE OF NEW HAMPSHIRE,

Plaintiff,

v.

STATE OF MAINE,

Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

STATE OF NEW HAMPSHIRE

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INTRODUCTION

Maine has moved to dismiss New Hampshire's complaint on the ground of *res judicata*. Maine's motion should be denied because it does not establish the foundation for application of this doctrine and relies on conclusory assertions as to complicated historical developments that cannot be evaluated on the limited record now before this Court. Although Maine asserts that the history of the boundary "is beyond reasonable dispute," its brief misinterprets historical events and misconstrues basic principles of law in rebutting New Hampshire's arguments.

Maine has not and cannot reconcile its alleged historical claim to a mid-channel boundary with historical evidence that shows that after 1740 the entire harbor and Port of Piscataqua was considered part of New Hampshire for purposes of taxation, regulation of navigation and defense, that New Hampshire provincial duties were imposed on vessels trading in the harbor, and that the entire harbor was included in the definition of Rockingham County approved by the King in 1770. Similarly, Maine's asserted historical right to a mid-channel boundary cannot be reconciled with the role and function of the Privy Council with respect to regulation of colonial trade and with historical evidence that shows that neither Massachusetts in the 1760s nor the boundary commissioners in 1828 understood the language of the 1740 order to describe a mid-channel boundary. The determination of the true and correct historical boundary between New Hampshire and Maine cannot properly be made on the record submitted by Maine.[1]

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[1] The scope of this brief does not allow New Hampshire to rebut each of Maine's factual allegations in detail. Given the posture of the case, and considering the extensive briefs and appendices previously submitted in connection with New Hampshire's Motion for Leave to File, New Hampshire understands the intention of the Court in inviting Maine to file a motion to dismiss was to address *res judicata* as a preliminary issue separate from the complicated historical questions otherwise

I. MAINE'S ARGUMENT AS TO THE PRECLUSIVE EFFECT OF THE 1740 ORDER IN COUNCIL RELIES ON INCORRECT STATEMENTS IN SECONDARY WORKS CONCERNING THE PROCEEDINGS AND THE CONTEXT OF THE ORDER

In its Motion to Dismiss, Maine contends that the 1740 order in council constitutes a judicial judgment that adversely determined New Hampshire's present claim to a boundary that runs along the Maine shore of Portsmouth Harbor, and that the underlying 1737 report of the boundary commissioners involved an actual adjudication of Massachusetts' claim to a mid-channel boundary. These contentions are based on misstatements concerning the actual proceedings before the boundary commissioners as well as a misunderstanding and misapplication of basic principles of English law concerning the rights and interests existing in 1740 with respect to the port and harbor. Maine's superficial and inaccurate discussion of the nature of the proceedings that gave rise to the 1740 order in council does not squarely address the distinctions made by New Hampshire, but rather restates the nature and course of the boundary proceedings in imprecise terms which obscure the relevant factual and legal distinctions.

One of the essential elements of *res judicata* is that the issues or claims for which preclusion is sought be the same

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[1] *Cont.*

raised by this case. Maine has, however, devoted most of its brief to presenting its version of the 370-year history of the boundary, with which New Hampshire disagrees as to matters both of detail and of interpretation. For reasons previously given, there are voluminous records and expert opinions which must be considered in reaching valid conclusions on these historical questions. In the event this Court determines that the issue of *res judicata* cannot be decided without reference to the disputed evidence cited by Maine, New Hampshire requests that the motion be submitted to a master for hearing with leave granted to Maine to renew its motion after hearing.

issues or claims that were litigated in the prior litigation.[2] To prove this element of its *res judicata* claim, Maine relies on a passage in Belknap's *History of New Hampshire*, which suggests that New Hampshire and Massachusetts litigated the location of the boundary in the Port of Piscataqua Harbor before the boundary commissioners. As Maine is well aware, the actual record of the proceedings before the commissioners, which was certified and transmitted to the Privy Council and which is still extant[3], contains no reference whatever to any dispute concerning the boundary along or in the harbor or river. Despite Maine's reliance on Belknap, it remains an historical fact that both New Hampshire and Massachusetts merely referred to the Piscataqua as the boundary, and that the location of that portion of the boundary was not in dispute before the boundary commissioners.[4]

Maine also fails to show that the Privy Council actually decided any issue concerning the location of the boundary within the river or harbor. Maine implies that because the Privy Council approved the commissioners' report with

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[2] *See e.g., Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597-98 (1948) (*res judicata* (1) bars repetitious suits on the same cause of action, and (2) estops a party from relitigating points that were actually determined in a prior action on which the finding or verdict was rendered).

[3] The record was transcribed and appears as Appendix B to Special Master's Report, *New Hampshire v. Maine*, No. 64 Orig. (Oct. 8, 1975).

[4] Both provinces generally described the boundary as "beginning at the entrance of Piscataqua Harbour" and passing up the same "into the River Newichwannock and through the Newichwannock to the furthest head." *See Demands of New Hampshire 1737, reprinted in* 19 N.H. Provincial Papers 283-84 (Albert S. Batchellor, ed. 1891); *Demands of Massachusetts, reprinted in id.* 290-92. Any implication in Belknap's History that a dispute over the location of the Piscataqua River boundary was presented to the commissioners is erroneous, and is disproved by the tenor of New Hampshire's exceptions to the commissioners' report ("Jurisdiction [of the river] hath Ever been in the Possession of this Province and *never Claimed by the Massachusetts....*") (emphasis added). *New Hampshire Appeal,* 2 N.H. Laws 771, 772 (1918).

respect to the "northern" boundary, the Privy Council must have ruled in Massachusetts' favor on the merits of this issue. Maine's conclusion does not logically follow from the demonstrated premises, and Maine fails to identify any evidence in the record that the Privy Council considered this issue at all. On appeal, Massachusetts argued that New Hampshire's petition improperly went outside the record.[5] As far as the record shows, this objection forestalled any substantive review of the Piscataqua boundary issue by the Council.[6]

In its Motion for Leave, New Hampshire argued that the 1740 order in council did not demonstrate any intention to recognize or confirm the rights of either New Hampshire or Massachusetts to the harbor and port. As shown below, it is clear that neither the boundary commissioners nor the Privy Council would have presumed to divide a port between provinces without authority from the Treasury, nor to determine the Crown's title and rights of prerogative in an arm of the sea without a careful analysis of the relevant charter provisions and explicit deference to the strong presumption in favor of the Crown's retention of its rights.[7] The

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[5] Petition of Massachusetts Agents to King, Oct., 1738 *reprinted in* 19 N.H. Provincial Papers 440, 447. The Appeals Committee of the Council dismissed the petition, without prejudice to Massachusetts' right to renew its objections when the merits of the commissioners' report were heard. Joseph Henry Smith, *Appeals to the Privy Council From the American Plantations* 448, n. 189 (1950), citing Privy Council Register, PC 2/95/15, 37.

[6] If the claim were not actually adjudicated, no preclusion would result even if it could have been adjudicated. Whatever the nature of the boundary proceeding, it resembles a declaratory judgment action more than an action at law, and even under modern *res judicata* principles, the order would bind the parties only as to claims actually adjudicated, not those that might have been presented but were not. *Restatement (Second) of Judgments* § 33 cmt. c (1982).

[7] *See* Sir Matthew Hale, *A Narrative Legall and Historicall Touchynge the Customs, in* Stuart A. Moore, *A History of the Foreshore and Law Relating Thereto* 319, 345 (3d ed., 1888).

record of the proceedings and the appellate record show that the boundary commissioners and the Privy Council did not give even minimal consideration to these issues. Accordingly, it cannot be inferred that the Privy Council intended to adjudicate Massachusetts' claim that its charter included part of a navigable river and port on its border with a province under direct royal government.[8] Furthermore, in the absence of adjudication of the crown's rights, the decision cannot be preclusive of New Hampshire's claims that are based on delegation by the crown after 1740, or any "possessory act [or] other act of dominion" by New Hampshire at the revolution. *See New Jersey v. Delaware,* 291 U.S. 361, 383 (1934).

Maine's argument that the Privy Council intended, by affirming the commissioners' report, to establish a mid-channel boundary through the harbor and port also lacks factual support in historical evidence. Laws and administrative records show that New Hampshire exercised exclusive authority over the harbor and Port of Piscataqua after the issuance of the 1740 order.[9] Maine neither mentions evi-

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[8] The absence of an opinion or clarification of the grounds for the order is typical of Council procedure at this date, and is not evidence of an intention to rule on all issues raised by the parties. *See* John Palmer, *The Practice on Appeals from the Colonies to the Privy Council* 34 (1831) ("No public discussion [of the grounds for decision] takes place [in the Committee on Appeals]; ... nor was it ... customary to give the reason at large on which the judgment was founded."); Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* 316-17, 480-81 (1950) (Appeals Committee reports typically gave no reasons for recommendation; orders in council were expressed in peremptory form).

[9] *See* fn. 35-37, *infra*. The legal issue of jurisdiction over the Maine side of Piscataqua Harbor was explicitly raised by ship owners in the 1740s in connection with the enforcement of provincial tonnage duties. The Massachusetts law in question authorized town selectmen "where any fishing and coasting vessels may belong" to levy an assessment on tonnage to be collected by the town constable, and for delinquent constables to be liable to the province treasurer for uncollected assessments. An Act For Granting to His Majesty a Duty of Tonnage and Shipping, ch. 22 § 3, 3 Acts and Resolves Public and Private of the Province of Massachu-

dence of this kind in its motion to dismiss nor includes relevant historical records concerning the control and regulation of the Port of Piscataqua in its extensive appendices. Had this evidence been presented, the historical record would unequivocally confirm New Hampshire's exclusive governance of the harbor and Port of Piscataqua after the issuance of the 1740 order. Instead, the evidence cited by Maine, including the 1761 second commission to Wentworth, the Blanchard and Langdon map, and Belknap's 1791 description of the boundary, offers no insight into either what was disputed before the boundary commissioners or what the Privy Council and King intended by confirming the Decree. Ironically, although Maine places great weight on Belknap's 1791 narrative description of the boundary as confirming its construction of the 1740 order, the map contemporaneously prepared by Jeremy Belknap depicts the boundary of Rockingham County, New Hampshire as running along the Maine shoreline. The Belknap map (App. at 22a-23a) places the islands and harbor entirely in New Hampshire.

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[9] *Cont.*

setts Bay 203 (1744-1745); Appendix hereto (hereinafter "App.") at 2a. The constable for the Town of Kittery complained to the Massachusetts governor and General Court that vessel owners assessed by the Kittery selectmen had refused to pay the tax on the ground that they had not entered into any ports or harbors in Massachusetts, but only into a port "within some other government," as they "had entered only in the Port of New Hampshire where they had been subjected for the payment of all customs and provincial duties"; that all vessels belonging to Kittery had entered and cleared in New Hampshire for "upwards of 100 years"; and that one of the vessels had, in the year of assessment, been impressed for military service by the government of New Hampshire. Petition of Caleb Hutchings (undated; *c.* 1755), 65 Mass. Archives Coll., 93; App. at 6a. The Massachusetts General Court, upon receiving a report of a committee to consider the petition, by joint resolution, determined that the selectmen had no power to levy the assessment, and ordered the province treasurer to discharge the town for the amount of the assessment. *Id.;* Journal of the Honorable House of Representatives of His Majesty's Province of the Massachusetts Bay ... 46 (1755); App. at 9a.

II. MAINE MISCONSTRUES NEW HAMPSHIRE'S LEGAL CLAIMS AND THEORIES

Maine's response to certain points raised by New Hampshire also fails to confront the substance of New Hampshire's arguments. In its motion, New Hampshire argued that the Privy Council would not have infringed on the Treasury's jurisdiction to appoint and administer ports in the colonies. In rebuttal, Maine misconstrues New Hampshire's argument, stating that New Hampshire's "suggestion that the Board of Trade ... possessed jurisdiction over colonial boundaries is simply wrong." Defendant's Motion to Dismiss and Brief in Support of Motion to Dismiss at 24 (hereinafter "Defendant's Motion to Dismiss"). New Hampshire has never made such an argument. To the contrary, New Hampshire argued that the *Treasury* had authority over the appointment of ports by act of Parliament and that the council would not have established a provincial boundary dividing a port.[10]

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[10] In fact, New Hampshire has explicitly denied that the Board of Trade had such jurisdiction. Plaintiff's Reply to Defendant's Brief in Opposition to Motion for Leave to File Complaint at 2, n.4 (hereinafter "Plaintiff's Reply Brief"). Maine seems to confuse the Board of Trade with the Treasury, but the latter was a branch of government independent of the Privy Council, whose authority in regard to the appointment of ports in the colonies was granted by statute. *See* Opinion of Attorney General and Solicitor General, October 18, 1697, *reprinted in* 2 *Documents Relating to the Colonial History of the State of New Jersey* 177-78 (William A. Whitehead, ed., 1881) ("Ports [by Act of 25 Car. 2, ch.7, § 3] are to be appointed in the plantac'ons by the Commisoners [*sic*] of the Customes in England by and under the authority and directions of the Lord Treasurer or Com'issioners of the Treasury, in the respective plantations ...."); *see also* 2 Edward Raymond Turner, *The Privy Council of England in the Seventeenth and Eighteenth Centuries 1603-1784*, 416 (1928) ("For the most part all things that concerned treasury [&c]... were now [as of early 18th century] dealt with effectively by boards of commissioners that in effect constituted subordinate councils – councils subordinate to the cabinet, however, rather than to the privy council, from which largely they stood aloof in independence. Parliament had taken legislation completely to itself....").

This argument has particular relevance because to establish that the 1740 order in council bars New Hampshire's present claim, Maine must prove that the boundary commissioners and the Crown acting in council intended and had competence to appoint part of the territory of the Port of Piscataqua to Massachusetts.[11] Previously, New Hampshire demonstrated that the Privy Council when confronted with an inter-provincial dispute concerning jurisdiction of a province to enforce provincial duties in a harbor on the boundary with another province, explicitly deferred to the Treasury.[12] The Privy Council's competence to adjudicate rights to the harbor of the Port of Piscataqua cannot be presumed, and its failure to refer the question to the Treasury or even to seek advice as to the status of the port is indicative that it did not intend to establish a boundary that would divide the harbor or port. The application of these principles to the 1740 order convincingly explains why the 1740 order had no apparent effect on the actual exercise of governmental authority in the harbor, and why in 1782 New Hampshire's Naval Office, Eleazer Russell, stated that "New Hampshire hath always possessed jurisdiction over the river."[13]

Maine responds to the legal issue raised by New Hampshire concerning the competence of the Privy Council to divide the port and harbor by citing several cases that hold generally that the Council had original jurisdiction over provincial boundary disputes. Defendant's Motion to Dis-

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[11] It is a requisite element of *res judicata* that the issue or claim be adjudicated by a court of competent jurisdiction. To the extent the Privy Council is treated as a modern judicial court, its competence to determine certain matters must be treated as equivalent to the modern concept of subject-matter jurisdiction as a prerequisite to the application of *res judicata*.

[12] *See* Plaintiff's Reply Brief at 2, n. 4.

[13] Letter from Eleazer Russell, New Hampshire Naval Officer, to Meshech Weare, president of New Hampshire (June 10, 1782), 18 N.H. State Papers 716, 716 (Isaac W. Hammond ed., 1890)

miss at 22. None of these cases, however, provide any precedent for the authority of the Privy Council to divide or incorporate a port located within a navigable river, to grant or apportion the King's prerogative rights with respect to ports, or to convey title to submerged tidal land. As previously shown, with respect to the appointment of a port to a province for purposes of regulation and taxation of shipping, the Treasury was the primary authority.[14] As to the adjudication of any claim of a grant of the King's prerogative rights with respect to the navigable inland waters comprising the Port of Piscataqua or title to submerged tidal lands within the port, those matters would have been between Massachusetts and the crown (New Hampshire being a royal province without a charter), and the boundary commissioners would have been required to examine the terms of the Massachusetts 1691 charter in light of the strong presumption against any such grant.[15]

It is instructive to compare the proceedings in the 1740 New Hampshire-Massachusetts boundary case with those held on the 1721 petition of Thomas Gookins for a grant by the crown of islands in the Delaware River between Delaware and Pennsylvania.[16] The Gookins petition was referred to the English attorney general and solicitor general, together with copies of extracts from the grant of New Jersey and the charter of Pennsylvania, for an opinion as to "Whether Delaware River or any part thereof or the Islands therein lyeing are by the said Clauses Conveyed to either of the said Provinces, or Whether the Right thereunto doth

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[14] *See* Plaintiff's Reply Brief at 2, n. 4.

[15] *See fn.7, supra; see also Case del Royall Piscarie de le Banne*, Dav. 55, 80 Eng. Rep. 540, 543 (1610) (General words in a grant of the king will not pass any special royalty which pertains to the Crown by prerogative).

[16] Letter from Popple, Secretary to Board of Trade, to agents for Pennsylvania and New Jersey giving notice of hearing on petition (May 20, 1721), *reprinted in* 5 *Documents Relating to the Colonial History of the State of New Jersey* 6.

Still remain in the Crown." The law officers, after a hearing, concluded that the river and islands were not within either province, but remained in the crown[17], the Committee of the Privy Council accordingly recommended that the islands be directly granted by the crown, and the Privy Council approved the Committee report.[18] Given the Privy Council's concern in 1740 with reducing the power of Massachusetts, the importance of the Port of Piscataqua to the enforcement of the navigation laws relating to the mast trade, and the similarity of the legal issues relating to Piscataqua Harbor to those involved in the question of the Delaware islands 20 years earlier, there is no basis to infer that the Council intended to adjudicate the rights of Massachusetts and New Hampshire to the harbor and port without even submitting the question for advice of counsel.[19]

Moreover, in order to prevail on its *res judicata* argument as to the order in council, Maine must show that the order was a final judicial judgment rather than merely a political decision within the scope of the king's prerogative. If the latter, then regardless of the intended meaning of the order with respect to the harbor, and regardless of the Privy Council's constitutional authority to order the division of the harbor, the decision would not have involved the adjudication of legal rights and would have been subject to change. In this case, the crown did subsequently indicate its intention that the entire harbor remain part of New Hampshire by, *inter al.*, ordering successive New Hampshire governors

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[17] Opinion of Attorney General and Solicitor General ..., Aug. 5, 1721, *reprinted in id.* at 16; App. at 10a.

[18] Order in Council ..., May 24, 1722, *reprinted in id.* at 28.

[19] With respect to the Delaware River islands, the Board of Trade recommended that "the government of such islands when granted, be annex'd to that of New Jersey, which Province is more immediately under your Majesty's Government than that of Pennsylvania," and this advice was approved by the Committee of Council. *Id.* at 20, 31. This specific policy makes it difficult to conceive of the council's having intended to grant part of Piscataqua Harbor to Massachusetts in 1740.

to continue to collect the provincial tonnage duties which were levied on all foreign vessels entering the harbor,[20] holding the New Hampshire governor responsible for controlling illicit trade in the harbor,[21] referring to the harbor as located in New Hampshire and relying exclusively on the New Hampshire governor and naval office for compiling shipping records,[22] and approving in 1770 of the establishment of the boundaries of Rockingham County as "including the [Piscataqua] River."[23] Such evidence of the royal pleasure after 1740 could be disregarded, as Maine implicitly would do, only if the order in council involved a final adjudication of legal claims as a matter of the rights of the parties. This, however, is not the case. This Court has previously recognized that the 1740 order "was not governed by legal principles, but was an exercise of the king's prerogative." *Rhode Island v. Massachusetts*, 45 U.S. 591, 634

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[20] *See, e.g.*, His Majesty's Instructions to Governor Benning Wentworth, ¶ 79, 3 N.H. Laws 251, 277 (1761).

[21] *See* Letter from New Hampshire Governor Benning Wentworth to Board of Trade, March 4, 1764 (Public Record Office, CO5/928):

> The place of my residence is within a Mile of His Majesty's Fort at the Enterance [*sic*] of the Harbour, and no Vessell can come into the Port without coming within my Sight, which I believe has Contributed in a great measure to the Chastity of the Port, besides I have Constantly a Weekly return made me by the Commanding Officer of the Fort, of all vessells inwards and Outwards Bound, by which, with the Vigilance of the Collector, and my own Aversion to all Contraband Trade, I am hoping to Preserve our Integrity so as not to fall under HM's Displeasure for Omissions of Duty.

[22] *See* fn. 36, *infra*. The duties of the governor and his deputy, the naval officer in this regard were limited by statute to the province for which they were appointed. *See* Stat. 22-23 Car. 2 ch. 26 § 7 (1670-71) (Eng.); 7-8 Will. 3 ch. 22 § 4 (1695-96) (Eng.); *see also, e.g.*, Trade Instructions to Governor Benning Wentworth, ¶ 9, 3 N.H. Laws 281, 293-94 (1761) (governor required to transmit naval office lists of all ships "trading in the said province [*i.e.*, New Hampshire]")

[23] An Act For Dividing This Province Into Counties, And For The More Easy Administration Of Justice, ch. 9, 3 N.H. Laws 524, 525 (1769).

(1846).[24] Indeed, in 1744 the crown explicitly considered changing the boundaries established in 1740.[25] Thus, the 1740 order was clearly not understood even by the Council itself as having preclusive effect. This Court, therefore, must consider not only what the Council did or did not intend to decide in 1740 with respect to the location of the boundary, but the legal question of whether the 1740 order constituted a final judicial judgment adjudicating the rights of Massachusetts and New Hampshire to the harbor.

III. MAINE'S CONSTRUCTION OF THE LANGUAGE OF THE 1740 DECREE IS HISTORICALLY UNSOUND

To establish that *res judicata* bars New Hampshire's claim to a boundary along the Maine shore, Maine must show that the Privy Council actually adjudicated the Crown's and Massachusetts' territorial rights in the port and the harbor.[26] Maine argues that the Privy Council must have adjudicated territorial rights to the port because the language of the 1740 order unambiguously describes a mid-channel boundary through the harbor. The circular nature of Maine's theory, premised almost exclusively upon the

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[24] Even after establishment of the Judicial Committee in 1833, the Privy Council was only beginning to have some of the characteristics of a law court; the doctrine of *stare decisis* did not apply and the decisions of the Privy Council were not binding on common law courts. 1 W.S. Holdsworth, *History of English Law* 518-520 (7th ed. 1956).

[25] *See* Journal of the Commissioners for Trade and Plantations from April 1704 to May 1782, February 17, 1748 (Massachusetts complaint referring to September 1744 order of His Majesty directing that if the New Hampshire assembly failed to pay for defense of a certain fort located in New Hampshire as a result of the 1740 boundary decision, he would restore the fort with a "proper district" to Massachusetts).

[26] As New Hampshire was a royal province without a charter, the governmental rights to the port and harbor rested with the Crown. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842) (land under navigable waters passes as an incident of government).

assertion that the 1740 order allows for only one construction (i.e. a boundary along the thalweg), allows Maine to dismiss legal questions concerning the authority of the Privy Council to divide a port and historical evidence of New Hampshire's control and regulation of the entire harbor and port. Maine simply ignores other interpretations of the commissioner's report, such as the use of "middle" to designate the principal branch of the river as distinct from other tributaries, or to refer to the thread of the river above the navigable or tidal part. Historical evidence that directly pertains to the construction of the language of the order and that compels a different construction of the 1740 order, however, cannot be ignored.

In 1763, Massachusetts appointed a Committee to perambulate the boundary line between Maine and New Hampshire and prepare a report on the line run by Walter Bryent pursuant to the Governor Belcher's instructions in 1741. In 1766, the Committee submitted a report to both Houses of the Massachusetts Assembly on the boundary line. In their report, the Committee found that Bryent had made a mistake in running the boundary because he had not run the boundary up the *main or middle branch of the river*. As the Committee Report states:

> Mr. Bryent was mistaken in taking a pond at the head of the east branch ... when he should, agreeable to the commissioners' report, have taken the middle or main branch of the river, ... and as those *two* branches are at six or seven miles distance ... a large tract of land near six miles wide ... was taken in New Hampshire government, that ought to have remained to the Massachusetts.[27]

In connection with the 1760 boundary proceeding, Massachusetts employed Captains Gowen and Warren to survey the boundary and prepare a map showing the nature and

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[27]3 Jeremy Belknap, *The History of New Hampshire* 291, 293 (1812) (emphasis added).

extent of Massachusetts' claims. The map prepared by Captains Gowen and Warren in 1763 shows only the shoreline of Maine through the harbor. (App. at 20a-21a). Gerrish Island is the only island shown on the map.

In 1828, boundary commissioners appointed by Maine and New Hampshire considered the question raised by Massachusetts in the 1760's of whether Bryent had correctly run the boundary up the "middle" branch of the Newichwannock River.[28] To settle this matter, the commissioners reviewed evidence concerning which branch of the Newichwannock had the greater flow of water. Because they concluded that the easterly branch of the river had the greater flow, the commissioners determined that Bryent had run the boundary up the correct branch of the river.[29]

Maine argues that the 1828 Report of the Boundary Commissioners confirms its construction of the 1740 order as establishing a mid-channel boundary. Maine's argument is misplaced. In fact, the 1828 Boundary Report and Agreement provide compelling historical evidence showing that Maine's construction of the 1740 order is historically unsound. As the 1828 Report makes clear, the commissioners understood the phrase "up the middle" to refer to the course and direction of the boundary as running up the main branch of the river.[30] The report repeatedly equates the

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[28] The commissioners found that "Whatever claims in relation to this line heretofore appertained to Massachusetts, the Commissioners of Maine had.0 the right to insist upon." 1828 Report of the Commissioners at 10 (Appendix to Maine's Motion to Dismiss at 112a.) *See also* N.H. Map Lodging, Map No. 27, p.78 (Fletcher map showing the "middle branch" of the Newichwannock).

[29] *Id.* at 9.

[30] The use of the term "middle" to describe the main branch of the river also appears in the 1663 Charter from Charles II to the governor and council of Rhode Island which provides that the line with Connecticut shall run "along the [Pawcatuck] River, as the greater or middle streame therof reacheth or lyes up into the north countrye." *Charter of Rhode Island and Providence Plantations, reprinted in* 6 *The Federal and State*

terms "middle" and "main" using them interchangeably to refer to the part of the river having the greater flow of water. Nothing in the 1828 Report suggests that the commissioners construed or understood the phrase "up the middle" as establishing a mid-channel boundary through the harbor.

The Agreement of the boundary commissioners further confirms that the commissioners understood the word "middle" to describe the course of the boundary along the main branch of the river.[31] There, in the formal description of the true boundary line between New Hampshire and Maine, the Commissioners stated that the line shall "pass up through the mouth of Piscataqua harbor, and *up the middle of the river* of Newichwannock, part of which is now called the Salmon Falls and *through the middle of the same* to the farthest head thereof."[32] This agreement, which was inscribed on a large parchment separate from the report, contains no reference whatever to "middle" with respect to the Piscataqua. In no way can the formal language of the 1828 agreement be read to

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[30] *Cont.*

Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies 3211, 3220 (F.N. Thorpe, ed. 1909). See *also*, 1828 Report of the Commissioners at 7 (Appendix to Maine's Motion to Dismiss, 112a) ("It was contended on the part of Massachusetts, that what they term the middle or main branch should have been taken by Bryent instead of the eastern branch, upon the allegation that it was a larger stream ....").

[31] Maine's Motion to Dismiss does not refer to the Agreement of the Commissioners. The Commissioner's Agreement appears in Maine's Appendix at 125a-130a.

[32] Although the agreement on the boundary line appears to quote from the 1737 report, it makes a significant change in the wording of that report. In the 1828 Agreement, the phrase "up the middle" is applied specifically to the Newichwannock River. This change reflects the determinations made in the report. The revision to the language of the 1737 report may have been intended to clarify the language to comport with the commissioners' understanding of the location of the boundary.

support Maine's argument as to the division of the harbor. By omitting any reference to the word "middle" in any context that could be interpreted to divide the harbor, the 1828 agreement tends to support New Hampshire's understanding of the 1737 report, and explains why Walter Bryent commenced his survey of the boundary line at the Newichwannock River and not the mouth of Piscataqua harbor and why Massachusetts did not exercise jurisdiction over the Port of Piscataqua after the issuance of the 1740 order.[33]

IV. MAINE'S RELIANCE ON PRESCRIPTIVE EVIDENCE TO PROVE ITS HISTORICAL CLAIM IS MISPLACED

Maine devotes much of its argument to incidents occurring between 1789 and 1977 that it claims reflect an understanding as to the location of the boundary. As Maine has disavowed a claim based on prescription and acquiescence (Maine's Brief in Opposition to Motion for Leave to File Complaint at 19), the central issue before this Court is the historical location of the boundary at the time of New Hampshire's and Massachusetts' admission to the union. The "prescriptive" evidence cited by Maine bears no relation to the judicial proceedings in which the respective judgments that allegedly gave rise to Maine's *res judicata* defense occurred.

Significantly, Maine's abridged history of the boundary almost completely ignores the period between 1740 and 1789 when historical events would be more likely to reflect the contemporary understanding of the 1740 order. Contrary to Maine's unsupported conclusion that the language of the 1740 order must describe a mid-channel boundary, it is quite clear that the 1740 order was not understood by either

[33] Governor Belcher's instructions to Bryent directed him to prepare a surveyed plan of the boundary beginning at the mouth of Piscataqua harbor and continuing 120 miles (Appendix to Maine's Motion to Dismiss at 30a-31a).

province or by the British government to divide Piscataqua harbor, much less to divide it along the thalweg. New Hampshire has previously described some of the records demonstrating the consistent acts of exclusive governmental control over the entire harbor by New Hampshire provincial and state officials.[34]

Maine's response to New Hampshire's characterization of governmental activity in the harbor between 1740 and 1789 is limited to rebutting an argument as to the geographical extent of parliamentary customs districts, an argument which New Hampshire did not make. Rather, New Hampshire has pointed to various aspects of governmental activity under authority of New Hampshire province laws, or undertaken by New Hampshire provincial officials, which would have been illegal if part of the harbor had been in the province or state of Massachusetts. These activities include (1) the collection of *provincial* (and later state) duties on all shipping in the harbor,[35] (2) the requirement that vessels enter and clear

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[34] *See* Motion for Leave to File Complaint, Complaint and Brief in Support of Motion and Complaint (hereinafter "Motion for Leave") at 9-22; 42-45, ¶¶25-32.

[35] New Hampshire's powder duty was payable on vessels "coming into any port or part of this Province," An Act About Powder Money, ch.6, 2 N.H. Laws 257 (1718), and, as indicated by the Hutchings petition, fn. 9, *supra*, was paid by vessels coming into Kittery. Conversely, Massachusetts tonnage duties, which were sometimes payable by coasters and fishing vessels in the towns to which they belonged, fn. 9, *supra*, and regularly by other vessels to the deputy provincial commissioner of impost at the time of "entring into port or harbour within this province," *e.g.*, An Act For Granting To His Majesty a Duty of Tonnage on Shipping, ch. 22 § 1, 3 Acts and Resolves Public and Private of the Province of the Massachusetts Bay 203 (1744-45) (App. at 2a), were not paid by vessels entering the Piscataqua. Later New Hampshire enactments relating to shipping duties expressly applied to all vessels entering the harbor. *E.g.*, An Act In Addition to An Act Entituled An Act For Establishing a Light to be Kept at Fort William and Mary For the Benefit of Vessels Arriving or Being Upon This Coast in the Night Time, ch.7, 3 N.H. Laws 572 (1772) (duty payable by all vessels "at their first Entry into the Har-

exclusively with the New Hampshire naval office,[36] and

[35] *Cont.*

bour"); An Act in Addition to An Act Intitled An Act For Establishing A Lighthouse passed April the Ninth One Thousand Seven hundred and eighty Four, ch. 20, 5 N.H. Laws 35-36 (1784) (duty payable by vessels "which shall come and anchor in said Harbour" regardless of whether they enter with the naval office).

[36] The shipping lists for the Piscataqua during the colonial period were always transmitted by the New Hampshire governor or naval officer. *See* Journal of Commissioners for Trade and Plantations, July 6, 1743 (Governor of New Hampshire forwarding account of vessels entered and cleared "at Piscataway"); *id.*, July 27, 1743 (naval officer's list of vessels entered and cleared "at the Port of Piscataqua in New Hampshire"); *id.*, Oct. 24, 1754 (letter from New Hampshire naval officer transmitting "list of ships entered and cleared at Piscataway in New Hampshire"); *id.*, Jan. 22, 1760 (Governor of New Hampshire transmitting list of ships entered and cleared "in the Harbour of Piscataqua"). After independence, a naval office "for the Port of Piscataqua & the other places within this state" was established by act of the New Hampshire legislature. This act required every vessel which should "arrive within the Port of Piscataqua" to enter at the naval office, and directed the commanding officer of the fort (*i.e.*, Fort Constitution at the entrance to the harbor) to suffer no ship to pass out of the harbor without a clearance certificate. An Act For Establishing A Naval Office at Portsmouth Within the County of Rockingham and For Regulating the Trade and Navigation In This State, ch. 14, 4 N.H. Laws 184, 185 (1778), Appendix to Plaintiff's Motion for Leave to File Complaint at 14a. Massachusetts also required entry and clearance with its naval officers of vessels arriving or sailing out of "any port, harbor or place within this state." An Act For Establishing a Naval Office and For Ascertaining the Fees, ch. 22, §§ 3, 4, 5 Acts and Resolves Public and Private of the Province of Massachusetts Bay 600, 601 (1776-1777) App. at 12a. Massachusetts set up a naval office at York, which would have included any part of the Piscataqua within Massachusetts. *Id.* at §§ 1, 14, 5 Acts and Resolves at 603. App. at 12a (harbor or creek without naval officer to belong to nearest port having such an officer); *see also, e.g.*, Elections of Officers, June 17, 1783, 1 Supplement to the Acts and Resolves of the Province of Massachusetts Bay 230 (joint ballot of General Court electing naval officers for the various ports, including York). However, the York naval officer did not consider Piscataqua to be in his district, as he took fees for vessels clearing out for Piscataqua. *See* York Naval Officer's Accounts of May 26, 1786 and Aug. 30, 1786 *reprinted in* James Phinney Baxter, 21 *Documentary History of the State of Maine* 183, 184 (1908).

(3) the post-independence military occupation of the entire harbor and Seavey's Island.[37]

While ignoring these historically relevant events, Maine relies on the United States government's apportionment of the shipyard island with Maine as evidence that the 1740 order established a mid-channel boundary. Maine argues that because the Navy decided Dennett's Island was in Maine and because Dennett's Island is on the Maine side of the channel, the mid-channel must be the boundary. This argument is without merit. In 1814, the United States decided, based solely on the deed, that Dennett's Island was located in Maine.[38] Maine's attempt to derive a mid-channel boundary from this discrete event is both illogical and historically unwarranted. Records documenting the government's 1814 decision show that the United States did not review or consider the 1740 order or the location of the boundary when it assigned Dennett's Island to Maine. Even if the government had done so, its conclusion would not be entitled to deference by this Court. Significantly, the United States, even presently, has declined to express any opinion whatsoever regarding the location of the boundary.[39]

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[37] New Hampshire built, and its militia occupied, Fort Sullivan on Seavey's Island near the site where the Naval Prison was subsequently constructed. In a petition captioned "State of New Hampshire – Rockingham," the soldiers stationed there explicitly referred to the fort as located "in the state aforesaid," *i.e.*, New Hampshire. Petition dated Sept. 23, 1777, 15 N.H. State Papers 430, 431.

[38] Presumably, if the shipyard had been on Clark's Island, now one of the five conjoined shipyard islands, the Navy would have determined that the shipyard was in New Hampshire because many of the deeds for Clark's Island were historically filed in the Rockingham County registry of deeds. Rockingham County Registry of Deeds, V. 6, p. 301; V. 22, pp. 8-9; V. 23, p. 51; V. 51, pp. 171-74. A 1798 deed described the island as, "containing ten acres ... situate lying and being at the entrance of Piscataqua River in the State of New Hampshire." Although that deed describes Clark's Island as located in New Hampshire, it is filed in the York County Registry of Deeds, Book 66, p. 93. *See* 1798 deed of Benning Wentworth to Samuel Pearse, App. at 17a.

[39] By transmittal of Aug. 16, 1989 to Senator Bob Smith, the Portsmouth Naval Shipyard Legal Counsel stated, "Determination of the

V. MAINE'S LEGAL ARGUMENTS CONCERNING THE 1977 CONSENT DECREE ARE FLAWED AND ITS LEGAL AUTHORITIES ARE MISCITED

Maine argues that this Court's entry of the consent decree in *New Hampshire v. Maine*, 434 U.S. 1 (1977) (the lateral marine boundary case), bars New Hampshire's claim in this case under the doctrines of judicial estoppel and claim and issue preclusion, notwithstanding that the earlier case dealt with a different part of the boundary and that no issue relevant to the instant case was adjudicated in that proceeding. Consent judgments do not give rise to issue preclusion unless it is clear that the parties intended their agreement to have such effect. *Arizona v. California*, ___ U.S. ___, 120 S. Ct. 2304, 2319 (2000); *United States v. International Building Co.*, 345 U.S. 502, 506 (1952); *see also Restatement (Second) of Judgments* § 27 cmt. e (1982) ("In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, [issue preclusion] does not apply with respect to any issue in a subsequent action."). With respect to the lateral marine boundary consent judgment, it is clear that the parties did not so intend.[40]

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[39] *Cont.*

actual jurisdictional boundaries of Portsmouth Naval Shipyard is a matter entirely within the determination of the two states involved, in accordance with interpretation of applicable state and federal law. The Shipyard has no further comment on this issue." By letter of Oct. 22, 1990 to Senator Smith, W. Lee Rawls, Assistant Attorney General, U.S. Dept. of Justice, stated that, "Determination of the political jurisdiction is resolvable either through an original action filed in the United States Supreme Court or through an interstate compact approved by Congress. The Dept. of Justice would take no position on the merits of such a resolution and would advise the Navy to abide by that resolution." In a letter dated Aug. 6, 1990, H. Lawrence Garrett, II, Secretary of the Navy, stated that, "The Navy is a bystander in the boundary dispute between New Hampshire and Maine, and continues to strive not to take sides."

[40] Contrary to Maine's assertion, in the lateral marine boundary case New Hampshire sought a determination only of the lateral marine portion of the boundary between Portsmouth and Gosport Harbors. *See*

Maine argues that unlike an ordinary consent decree, the decree in the lateral marine boundary case could not have been entered without an actual adjudication of the issue of the proper construction of the 1740 order in council, because "simply rubber stamping a settlement would violate the compact clause." Maine's Motion to Dismiss at 29. This argument, however, was expressly rejected by this Court in 1976.[41] As this Court subsequently explained in *U.S. Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 452, 471 (1978), approval of the lateral marine boundary consent decree was consistent with its constitutional functions, not because the Court actually decided the underlying issues, but because the nature of the dispute was such that its settlement did not impose a risk of encroaching on federal sovereignty. At

[40] *Cont.*

New Hampshire's Complaint at ¶IV *New Hampshire v. Maine*, No. 64, Orig. (June 6, 1973). At no time did New Hampshire assert a claim with respect to any other part of the boundary. *See* Maine's Brief in Opposition to Motion to Intervene, *New Hampshire v. Maine*, No. 64, Orig., 4 (Oct. 11, 1974). ("The only property involved in this action is that which lies beneath the water in the disputed area"). Further, even if counsel for New Hampshire had presumed to agree that the consent decree would have preclusive effect with respect to the boundary inside the harbor mouth, a presumption which New Hampshire disputes, counsel would have done so without actual or apparent authority to bind New Hampshire in this case. Although the New Hampshire General Court opposed the consent decree itself and the principles on which it was based, the attorney general argued that he was nevertheless authorized to enter into it because it involved the settlement of pending litigation. *See* New Hampshire's Memorandum to the Special Master, *New Hampshire v. Maine*, No. 64, Orig., 3 (undated, filed March 1975), at 3; *see also New Hampshire v. Maine*, 426 U.S. 363, 365 n. 3 (1976). Subsequently, the New Hampshire Supreme Court opined that the attorney general could bind New Hampshire to the consent decree because it involved the settlement of authorized pending litigation. *Opinion of the Justices*, 373 A.2d 647 (N.H. 1977). The General Court, however, had only authorized litigation involving the lateral marine boundary. *See id.*

[41] "New Hampshire suggests ... that acceptance of the consent decree without an independent determination by the Court as to the validity of the legal principles on which it is based would be a circumvention of the Compact Clause.... We disagree." *New Hampshire v. Maine*, 426 U.S.

most, this Court determined in 1976 that the consent decree was not "wholly contrary to relevant evidence," 426 U.S. at 369, but this is not enough to set up collateral estoppel.[42] Although the consent decree utilized a stipulated location of the midpoint of the main channel of navigation (not the midpoint of the thalweg) to determine the beginning point for the lateral marine boundary, the actual course of the lateral marine boundary was set by application of modern principles of international law.[43] Thus, although this Court stated that "the boundary in dispute was in fact fixed in 1740," 426 U.S. at 366, Maine's interpretation of this statement to mean that the principles used in setting the location of the boundary were fixed in 1740 cannot be correct.

Because the parties did not use the "thalweg" to determine either the starting point or the course of the lateral marine boundary, the boundary stipulated to in 1976 does

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[41] *Cont.*

at 369. The Court could not have resolved the relevant issues on the merits, as the merits had not even been presented to the master. Furthermore, no issues were litigated concerning inland waters. *See transcript of oral argument, New Hampshire v. Maine,* No. 64, Orig., 43 (April 19, 1976):

> Q. You say that the only trial you had was basically a truncated one devoted to the authorization for the consent decree rather than a fight on the merits.
>
> Mr. Bradley [counsel for Maine]: Yes, your honor, we had no fight on the merits and no opportunity ....

Mr. Bradley: "All we did was determine a reasonable place for the thalweg to end without having any requirement for determining inland waters." *Id.* at 40.

[42] *See* Fleming James, *Consent Judgments as Collateral Estoppel*, 108 U. Penn. L. Rev. 173, 179-180 (1959). It also should be noted that much of the evidence relied on by New Hampshire in the instant case, particularly that relating to presumptions concerning the government of a port and title to navigable waters underlying a port, the role and procedure of the Privy Council, and the history of actual sovereignty over Piscataqua Harbor from 1740 to 1789, was not involved in the lateral marine boundary case, and was not presented either to the special master or this Court.

[43] Consent Decree ¶ 9, *New Hampshire v. Maine,* 434 U.S. 1, 2 (1977).

not begin at the midpoint of the thalweg and does not follow the thalweg.[44] As observed by the dissent in *New Hampshire v. Maine*, 426 U.S. at 372,

> ... the agreed boundary proceeds on absolutely straight lines, and it is incredible that a line following the main or deepest channel would proceed on such an invariable course. What the parties have actually done is to agree upon a line which they assert represents the course most usually followed by those navigating the harbor and the river. This is not at all the same thing as a boundary following the thalweg.

It would be anomalous to find that the thalweg is a controlling principle in the 1976 consent decree, when the decree itself did not apply such a principle in setting the location of the lateral marine boundary.

As a practical matter, neither the lateral marine boundary, defined as the straight line that connects the coordinates set out in paragraphs 6 and 8 of the Consent Decree, nor the northern extension of that boundary, which follows the line of range lights towards Pepperrell Cove, follow the thalweg. While New Hampshire does not dispute the northern extension of the lateral marine boundary that appears on the USCGS map as the line of lights on range, there is no authority for giving that line on the map preclusive effect as a thalweg boundary.[45] Even presently, the USCGS map of Portsmouth Harbor does not show a boundary in the inland waters or the harbor.[46]

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[44] The thalweg is defined as the "course down the stream, which is that of strongest current...." 2 Aaron Shalowitz, *Shore and Sea Boundaries*, § 1423, p. 375 (U.S. Dept. of Commerce 1962). The "thalweg" is determined by the hydrographic evidence, not by use.

[45] *See* Motion for Leave at 26, fn. 61.

[46] *See* New Hampshire's Map Lodging No. 12. The 1981 USCGS map distinguishes the lateral marine boundary from the mapped northern extension by showing the lateral marine boundary as a dashed line and the northern extension as a solid lights on range line.

Maine also asserts that the 1976 Consent Decree sets up a claim preclusion bar to New Hampshire's action. For this argument, Maine relies on *Oklahoma v. Texas*, 256 U.S. 70, 85 (1921). In that case, however, the Court treated claims involving the location of different segments of a boundary along a river as separate claims for purposes of *res judicata*, even though the location of both segments was governed by construction of the same terms of a single document. Thus, the Court held that the inclusion of a recital in the decree in the first case as to the rule to be applied in locating the boundary would not be conclusive in the subsequent case dealing with a different part of the boundary unless it were shown that the matter was "put in issue and directly determined in the former case." Because Texas showed that there had been an actual adjudication of a dispute presented to the Court for resolution, the Court applied issue preclusion. The Court did *not* apply claim preclusion.

Finally, with respect to judicial estoppel, this Court has recognized that "ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states." *Illinois v. Campbell*, 329 U.S. 362, 369 (1946). The case relied on by Maine in this regard, *Ohio v. Kentucky*, 410 U.S. 641 (1973), does not involve the application of judicial estoppel. As New Hampshire has previously argued (Plaintiff's Reply Brief at 10), judicial estoppel only applies when a party has previously taken a contrary position as a means of obtaining unfair advantage of an opponent. Maine argues that because it was to New Hampshire's advantage to settle the lateral marine boundary case it would be unfair for New Hampshire now to take a different position. This argument confuses advantage arising from the prior litigation, and advantage arising from the *position* taken in the prior litigation. In the lateral marine boundary case, *Maine* was the proponent of the "main channel of navigation" principle, and New Hampshire compromised in Maine's favor on this issue in order

to settle the case. There is no basis for inferring anything other than good faith negotiation on the part of New Hampshire in the 1976 Consent Decree.

CONCLUSION

The Court should deny Maine's Motion to Dismiss and rule that *res judicata* does not bar New Hampshire's claim to its historic boundary along the low water mark on the Maine shore.

Respectfully submitted,

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No. 130, Original

IN THE

Supreme Court of the United States

STATE OF NEW HAMPSHIRE,

Plaintiff,

v.

STATE OF MAINE,

Defendant.

APPENDICES

Chapter 22, 3 Acts and Resolves Public and Private of the Province of the Massachusetts Bay 203 (1744-45)

CHAPTER 22

AN ACT FOR GRANTING TO HIS MAJESTY A DUTY OF TONNAGE ON SHIPPING.

Preamble.

WHEREAS it appears necessary for his majesty's service, and for the preservation and defence of the trade of this province, that a ship of force, mounting twenty carriage-guns, be provided and made for that purpose as soon as possible, and that in order to purchasing such a ship, the treasury be forthwith supplied with the sum of eight thousand pounds in bills of the last emission, which sum, considering the heavy burthen of publick taxes the province now lays under, and the increase thereof that will be occasioned by the yearly support and maintenance of said ship, over and above the usual charge, also that the advantage of such a ship will chiefly accrue to the trade, it appears but equal and just that the same should be repaid into the treasury by a tax or duty on shipping; wherefore,–

Be it enacted by the Governor, Council and House of Representatives,

£8,000 to be paid on vessels entering into port or harbor within this province, &c.

[Sect. 1.] That from and after the publication of this act, until the end of seven years, and as much longer as the war shall continue, there be and hereby is granted to his most excellent majesty, for the drawing in and sinking the said sum of eight thousand pounds, as also towards the charge of maintaining such a ship during the war (if it

should continue after the said sum of eight thousand pounds is paid) the sum of sixpence a ton in silver money, at six shillings and eightpence per ounce, or in lieu thereof, equivalent in bills of credit of this province, on all ships and other vessels (excepting common coasters and fishing vessels) entring into port or harbour within this province, other than such as shall clear out of some other port or harbour within the same; and on all coasters trading from harbour to harbour within this province and fishing vessels, the like sum of sixpence per ton a year. And to render this act effectual,–

Be it further enacted,

Tonnage of vessels to be measured 1715-16, chap. 4. Vessels not to be cleared until the duty is paid.

[Sect. 2.] That the tonnage of all vessels, except fishing and coasting vessels, shall be measured and taken in manner as is directed in the act for building the lighthouse, passed in the first year of King George the First, chapter the third; and the commissioner of impost, or his deputy, is hereby directed and impowered, before he enters any ship or vessel that is by law required to enter, to demand and receive the duty by this act intended to be paid, and shall certify the same to the naval officer, and the said naval officer is hereby strictly forbidden to clear out any ship or other vessel until the master or owner of such ship or vessel shall produce a certificate that he has paid the duty by this act designed to be paid; and in case the master of any ship or vessel refuse to enter at the custom-house office as by law obliged, or to pay the duty by this act provided, any such delinquent or refusing master, over and above the penalty by law already provided, shall be liable to the

action or actions of the impost-officer for the time being, for the recovery of the duty by this act imposed, in any of his majesty's courts of record, or before any justice of the peace, as the nature of the case shall require; to prosecute which action or actions the said impost-officer or officers are hereby respectively impowered.

Be it further enacted,

Selectmen or assessors empowered to tax coasting vessels.

[Sect. 3.] That the selectmen or assessors of every town within this province, where any fishing and coasting vessels may belong, are hereby impowered and directed to assess and tax the vessels aforesaid, according to the direction of this act hereinbefore expressed; the measure of the vessel, in case of doubt, to be taken at the cost of the respective owners or masters, by the said assessors, unless the account of their measure first given in, be just and true (in which cases the charge to be born by the respective towns) and the said assessment and tax, when made, to commit to the constable or collectors of their towns respectively, who are hereby impowered and obliged to collect the same of the master or other person having the principal care thereof, and pay it into the province treasury; and the said assessors are further required and directed to transmit to the province treasurer, yearly, a list of every vessel by them, according to the tenor of this act, assessed and taxed, together with a certificate of the name or names of the constable or collectors to whom the said assessment shall have been by them committed to collect: and the province treasurer is hereby impowered and directed to issue out his warrants for the recov-

ery of the said duty or tax assessed as aforesaid on any coasting and fishing vessels against any delinquent constables or collectors as is by law in other cases made and provided.

Provided, nevertheless,

Proviso.

[Sect. 4.] This act shall not be construed to exempt any vessel aforesaid from being taxed as vessels heretofore. [*Passed April 5; published April 6, 1745.*

Petition of Caleb Hutchings [undated; c. 1755], - 65 Mass. Archives Coll. 93

Petition.

To His Excellency William Shirley Esq^{r} Govern^{r} & Commander in Chief of his Majestys Province of the Massachusetts Bay & the Hon^{ble} his Majestys Council & the Hon^{ble} House of Representatives in General Court assembled

The Petition of Caleb Hutchings humbly Sheweth, That in the year 1745 He was a Soldier in the Expedition against Louisbourg And in the Year 1746 was chosen one of the Constables for the Town of Kittery, & in the Latter part of that Year; the Selectmen sent your Petitioner a List of the Vessells said to belong to said Town & directed him to collect a Tax upon the Tonnage thereof amounting to the Sum of £21-11-6 & to pay the same to the Hon^{ble} William Foye Esq Province Treasurer provided that your Petitioner should receive a Warrant from the said Treasurer for his so doing.

Now may it please your Excellency & Honours, Your petitioner never received any Warrant from the said Treasurer for this purpose, However being desirous of discharging his Duty in the Premises in the best Manner in his Power He applied to the Persons to whom the Vessells belonged which were contained in said List, & demanded the Sums of them according to the Same who refused to account with & to pay your Petitioner the whole or any Part thereof alledging that they were not obliged to pay the Same by any Act of this Government; for that the Law for granting unto his Majesty Six pence p Ton on all Shipping entering into Port or Harbour within this Province, plainly exempted all such Vessels as did not enter into any Such Port or Ports; But entered only into Ports within some other Government; which latter was the Case with these Vessels & had entered only in the Port of New Hampshire, where they had been subjected for the Payment of all Customs & Provincial Dues

- They farther alledged that if Kittery was a Port it was given in Commission to the Collector of his Majesty's Customs in New Hampshire & that all Vessells which had belonged to said Town for upwards of 100 Years had entered & Cleared there accordingly, And that one of the Vessels in your petitioners said Tax List was impressed from Kittery by the Governm^{t} of New Hampshire (the Year she was taxed) to carry Stores to the Garrison at Louisbourg in the New Hampshire Regiment Viz^{t} A schooner of 75 Tons Nahum Ward Master & that the Snow - Robert Oran master ab^{t} 130 Tons was a new Vessell fitted out the Latter End of the Year 1745 & was taken in the Year 1746 by the French & Carried into Martineco, & that the Snow John Jones Master about 140 Tons sailed a new Vessell in the year 1746 from Piscataqua & in returning to said Port foundered but a few Leagues from said Port & Vessell & Cargo were both Entirely lost - Now may it please your Excellency & Honours such being the Circumstances & Fate of the greater Part of the Vessells in my said Tax List, I could not find that I had any Remedy against the Vessells or the Owners of the same, But Notwithstanding there has lately issued from the present Province Treasurer an Execution against your Petitioner for the aforesaid sum of £21-11-6 which has been served upon your Petitioner by the Sheriff of the County of York & your Petitioner not being in Circumstances to pay the same, & apprehending if he was, that it does not of Right belong to him pay the Same, & being now out of Goal only by the Indulgence of the Sheriff till he could make application to your Excellency & Honours Humbly begs your Excellency & Honours would graciously be pleased to take his distressed Circumstances, his Innocence; into your Consideration & afford him such Relief, as in your great Wisdom Goodness & Compassion you shall see meet, & as in Duty bound shall ever Pray

Caleb Hutchings

In the House of Rep^{rs} June 9, 1755.

Read, and Whereas it Appears to this Court that the Select men of the Town of Kittery mistook the Law in levying an assessment upon the Vessels referred to in this petition; and that the Petr had no Authority to collect the same: Therefore Ordered That the Province Treasurer be, and he is hereby directed to withdraw his Execution which he has issued against the Petr and that he discharge the Town of Kittery of the sum of Twenty one Pounds eleven shillings and six pence New Tenor which they stand charged with in his Books for the aforesaid Assessment.

Sent up for Concurrence

T Hubbard Spkr

In Council June 9, 1755
Read and Concurred

Thos Clarke Deptv Secry

Consented to

W Shirley

Journal of the Honourable House of Representatives of His Majesty's Province of the Massachusetts Bay . . . 46 (1755)

Report on Petition of *Caleb Hutchins*.

The Committee appointed on the Petition of *Caleb Hutchins*, reported according to Order.

Read and accepted. And

Whereas it appears to this Court that the Select-Men of the Town of Kittery *mistook the Law in levying an Assessment upon the Vessels referred to in this Petition, and that the Petitioner had no Authority to collect the same:* Therefore,

Treasurer directed.

Ordered, That the Province Treasurer be and he is hereby directed to withdraw his Execution which he issued against the Petitioner, and that he discharge the Town of *Kittery* of the Sum of *twenty one Pounds eleven Shillings & Six Pence*, new Tenor, which they stand charged with in his Books, for the aforesaid Assessment.

Sent up for Concurrence.

5 Documents Relating to the Colonial History of the State of New Jersey 15 (William A. Whitehead, ed., 1881) (August 5, 1721)

Opinion of the Attorney General and Solicitor General, as to the ownership of the Islands in the Delaware River.

M[r] Attorney & Soll[rs] Gen[ls] Opinion whether the Isl[ds] in Delaware River, and the River, belong to y[e] Crown or to either of the Provinces, New Jersey or Pennsylvania. Dated y[e] 5[th] August 1721.

To The Right Hono'ble The Lords Commissioners of Trade and Plantations.

May it please your Lordships.

In obedience to yo[r] Commands Signify'd to us by M[r] Popple by his Letter of the 30[th] of June last Whereby he transmitted to use the annex't Coppy of two Clauses Extracted out of the Charter of New Jersey and Pensylvania whereby the Boundaries of those provinces are Ascertain'd & thereupon desired our opinion Whether Delaware River or any part thereof or the Islands therein lyeing are by the said Clauses Conveyed to either of the s[d] Provinces, or Whether the Right thereunto doth Still remain in the Crown – We have perused the said Clauses and have been Attended by the Agents of the parties who claim the Province of Pensilvania and their Counsel who laid before us a Coppy of the Letters Patents Granting the said Province and have heard what hath been alleadged on both Sides and upon Consideration of the Whole matter are of opinion that no part of Delaware River or the Islands lyeing therein are Compriz'd within the Granting words of the said Letters patents or of the said annex't Extract of the Grant of New Jersey; but we conceive that the Right to the same still Remaines in the Crown.

All which is humbly Submitted to your Lord Ships Judgement.

Aug^{t} 5th 1721

Rob: Raymond
Phi Yorke

Extract of King Charles the 2^{ds} Grant of New Jersey &c in America to the Duke of York, Dated March 12th 1664.

By these Presents for Us Our Heirs & Successors do give & grant unto Our Dearest Brother James Duke of York His Heirs and Assigns All that part of the Main Land of New England beginning at a certain place called or known by the Name of S^{t} Croix, next adjoyning to New Scotland in America, and from thence extending along the Sea Coast unto a certain place call'd Pemaquie or Pemaquid, and so up the River thereof to the farthest Head of the same, as it tendeth Northwards, and extending from thence to the River of Kinibiquie and so upwards to the shortest Course to the River Canada Northward; And also all that Island or Islands commonly call'd by the several Name or Names of Mattawacks or Long Island, situate lying & being towards the West of Cape Codd, And the Narrow Higansets, abutting upon the Main Land between the Two Rivers there call'd or known by the several Names of Connecticut & Hudsons River, together also with the said River call'd Hudsons River and all the Lands from the West Side of Connecticut River to the East Side of Delaware Bay, And also all those several Islands call'd or known by the names of Martyn Vineyards and Nantukes other Nantuket together with all the Lands, Islands, Soils, Rivers, Harbours, Mines, Minerals, Quarries, Woods, Marshes, Waters, Lakes, ffishings, Hawkings, Hunting & ffowling, and all other Royalties, Profits, Commodities & Hereditaments to the said several Islands, Lands & Premises belonging & appertaining with their & every of their appurtenances and all & other Estate, Right, title & Interest, Benefit, Advantage,

Claim & Demand of in or to the said Lands & premises or any part or parcel thereof. And the Reversion or Reversions, Remainder & Remainders together with the Yearly & other Rents Revenues & profits of all & singular the said premises & of every part and parcel thereof &c[e]

Extract of M[r] W[m] Penns Charter from King Charles the 2[d] for Pennsylvania, Dated 4[th] March 1680.

Have given, granted and by this Present Charter for Us, Our Heirs & Successors, do give & grant unto the said William Penn His Heirs & Assigns All that Tract or Part of Land in America with all the Islands therein contain'd as the same is bounded on the East by Delaware River from Twelve miles Northward of Newcastle unto the 43 Degrees of Northern Latitude if the said River extends so far Northward But if the said River shall not extend so far Northward, Then by the said River so far as it shall extend, And from the Head of the said River the Eastern Bounds are to be determin'd by a Meridian Line to be drawn from the Head of the said River unto the 43[d] Degree, The said Lands to extend Westward 5 Degrees in Longitude to be computed from the said Eastern Bounds, And the said Land to be bounded on the North by the Beginning of the 43 Degree of Northern Latitude, On the South by a Circle drawn at 12 Miles Distant from Newcastle Northwards & Westwards unto the Beginning of the 40 Degree of Northern Latitude, And then by a straight Line Westward to the Line of Longitude abovemention'd.

Chapter 22, 5 Acts and Resolves Public and Private of the Province of the Massachusetts Bay 600 (1776-1777)

CHAPTER 22

AN ACT FOR ESTABLISHING A NAVAL OFFICE AND FOR ASCERTAINING THE FEES.

Be it enacted by the Council and House of Representatives in General Court assembled, and by the authority of the same,

Town where a naval office shall be kept, for entering and clearing all vessels.

[Sect. 1.] That in the several seaports of Boston, Salem, Marblehead, Glocester, Newburyport, York, Pepper[*r*]elboro[*ugh*], Falmouth in Casco Bay, Townsend, Penobscot, Goldsborough, Machias, Plymouth, Barnstable, Dartmouth and the island of Nantucket, within this state, there be an office kept, to be called and known by the name of the naval office, for the purpose of entering and clearing of all ships and other vessels trading to or from this state, to take bonds, in adequate penalty, for observing the regulations made or which shall be made by the General Congress, or the general assembly of this state, concerning trade, take manifests, upon oath, of all cargoes exported or imported, and keep fair accounts and entries thereof, give bills of health when desired, and sign certificates that the requisites for qualifying vessels to trade have been complied with.

Fees of said office, established.

[Sect. 2.] And the fees to be demanded and received in the said office shall be these following, and no greater; that is to say –

	£ s. d.
For entering every ship and vessel from any part of this state, two shillings	[0 .2 0].

For clearing every ship and vessel to any part of this state, two shillings ..... [0 .2 0]

For entering every ship and vessel from any other of the United States upon this continent, six shillings ..... [0 .6 0]

For clearing every ship and vessel to any of the United States upon this continent, six shillings ..... [0 .6 0]

For entering every ship or vessel from a foreign voyage, six shillings ..... [0 .6 0]

For clearing every ship or vessel from a foreign voyage, six shillings ..... [0 .6 0]

For every register, six shillings... [0 .6 0]

For indorsing every register, one shilling, and for recording the same, one shilling and sixpence ..... [0 .2 6]

For every bond, two shillings ..... [0 .2 0]

For a certificate to cancel bond, one shilling ..... [0 .1 0]

For a bill of health, two shillings ..... [0 .2 0]

For every permit to unload from any of the United States of America, or from a foreign port, one shilling ..... [0 .1 0]

For a cocket, three shillings ..... [0 .3 0]

For every let-pass, eightpence ..... [0 .0 8]

And be it further enacted by the authority aforesaid,

To empower the naval officer to seize vessel and cargo that shall break bulk before entry.

[Sect. 3.] That every ship or vessel which shall arrive in any harbo[u]r or place within this state, from any port not within this state, shall, before breaking bulk, duly enter at the naval office at or nearest the port where said ship or vessel shall unlade, upon penalty of forfeiting such part of her cargo as shall be unladen before entry, as aforesaid, to the use of this state; and any naval officer of this state is hereby authorized and impowered to take and seize such goods, wares and merchandizes, unladen before entry as aforesaid, wheresoever the same may be found.

And be it further enacted by the authority aforesaid,

No vessel to be permitted to depart this state without a regular clearance.

[Sect. 4.] That no ship or vessel shall be permitted to sail out of any port, harbo[u]r or place within this state, and to proceed to sea, without having first duly cleared out at the proper naval office, and obtained a certificate thereof from the naval officer in the port where such ship or vessel may be, or, in case there shall be no naval officer in the port where such vessel may be, from the naval officer nearest thereunto; and every ship or vessel which shall presume and attempt to depart from any port, harbour, or place within this state without having duly cleared out, and obtained such certificate thereof as aforesaid, shall, upon conviction thereof, with her cargo and appurt[u][e]nances, be forfeited to the use of this state.

Provided, always, –

And be it further enacted by the authority aforesaid,

. . .

Ports, creeks, etc., where there is no naval officer, how to be considered.

[Sect. 14.] That all ports, creeks and havens within this state, at which no naval officers are by this act establish[e]'d, shall be consider[e]d as belonging to the next or nearest port at which a naval office is by this act establish[e]'d; any usage or custom to the contrary notwithstanding. [*Passed November 20.*

Deed of Benning Wentworth to Samuel Pearse dated Nov. 23, 1798, recorded July 28, 1800 Book 66 York County Deeds

93 B66 Benning Wentworth to Samuel Pearse

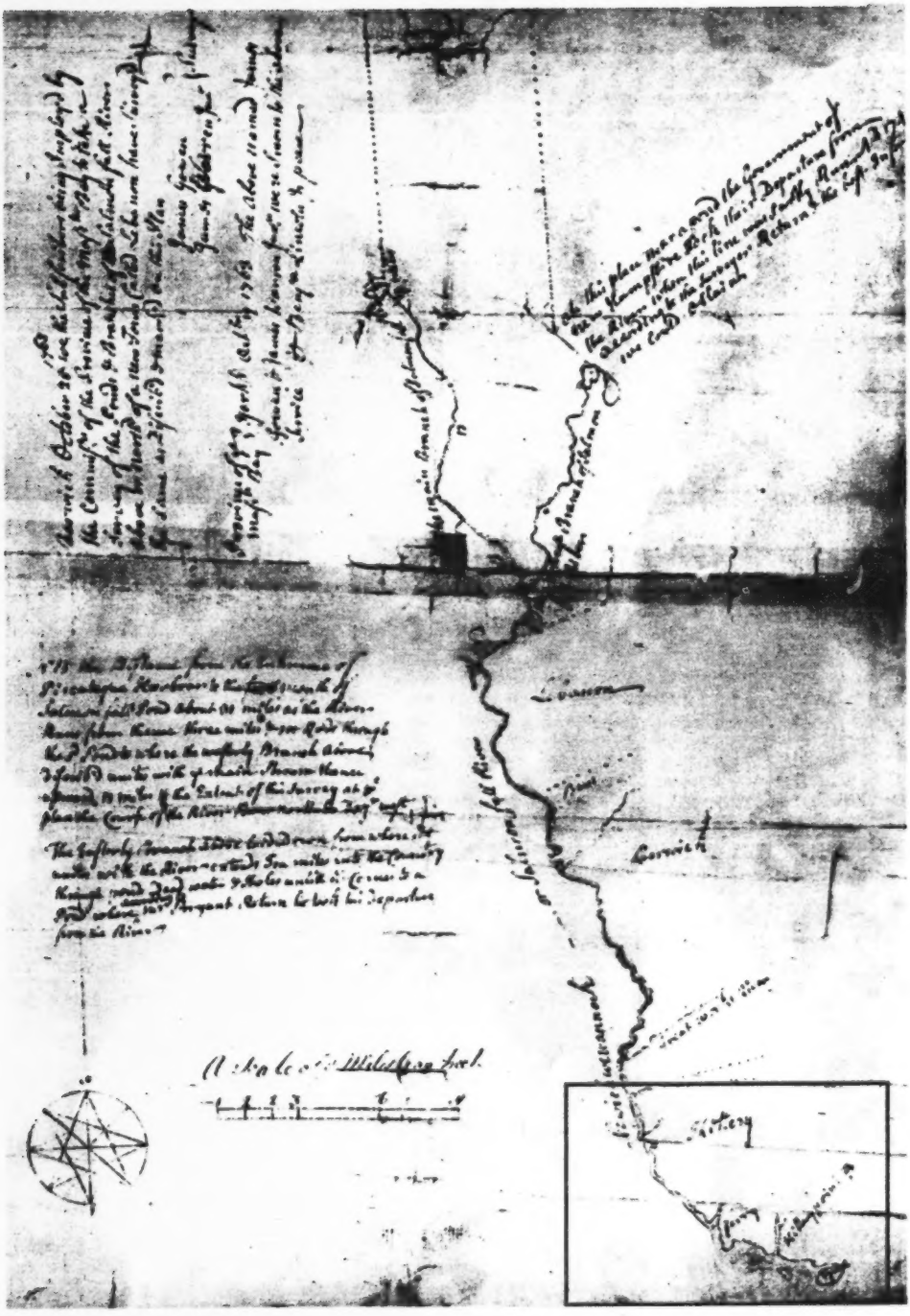
Know all men by these Presents that the Honorable Benning Wentworth Esquire Secretary of this His Majestys Province of Nova Scotia and Anne Wentworth his wife for and in Consideration of the sum of thirty seven pounds and ten Shillings of lawful Currency of the Province aforesaid to us in hand paid by Samuel Pearse of Penton Place Parish of Saint Mary Newington in the County of Surry and Kingdom of Great Britain Mariner the Receipt whereof we do hereby acknowledge; Have granted relented Surrendered Quitted claim and forever given up, and by these Presents do grant release Surrender quit claim and forever give up unto the said Samuel Pearse his heirs and assigns: All of the right, Title, Interest, claim or demand of what kind or Nature soever which we or either of us can or might have under and by virtue of a Mortgage made by Joseph Clark formerly of Portsmouth in the State of New Hampshire to Samuel Wentworth Esquire formerly of Boston in the State of Massachusetts bay or by any other way or means whatsoever in to and upon a Certain Island called Clarkes Island Containing ten acres more or less situate lying and being at the entrance of Piscataqua River in the State of New Hampshire to the Westward of the light House and bounded northerly from great Island upper cove so called easterly from an Island called Fernalds Island Southerly from an Island called Trefethern's or Jamaica Island and has been for some years occupied for the purpose of Drying Fish by four persons of the names Salton, Batson, Litchfield and Curtis with all and Singular the Reversion and Reversions Remainder and remainders rents Issues and profits debts dues or

demands of what kind or Nature soever which we can or may be entitled to receive Have claim or take out of all and Singular the said premises or any part thereof by virtue of the said before recited mortgage or by any other ways or means title or titles whatsoever or however derived or created to us whether by deed descent Inheritance otherwise. To Have and To Hold all and Singular our right title and Interest in an to the said before described Island and every part and parcel thereof with the appurtenances unto the said Samuel Pearse his heirs and assigns forever as fully and effectually as we or either of us might or could Hold occupy possess claim or enjoy the same or any part thereof and the said Benning Wentworth and Anne Wentworth do hereby for themselves their Heirs executors administrators or assigns Covenant promise and agree to and with the said Samuel Pearse his executors administrators and assigns that the whole of the Principal Sum Specified in said mortgage together with lawfull Interest thereon was justly due to the said Samuel Wentworth at the time of his death and that the same and every part thereof is still due and owing on the said Recited mortgage and that we or either of us Have not done, Signed, Sealed or Executed any deed act or thing Whatsoever or Howsoever whereby the said described premises or any part thereof could be released discharged or acquitted of & from the said recited mortgage – In Witness whereof we have hereunto set our Hands and Seals this twenty third day of November in the year of our Lord one thousand seven hundred and ninety eight.

Signed Sealed and Delivered in the presence of
Frances Wentworth
Eliz. Cormich

B. Wentworth (Seal)
Anne Wentworth (Seal)

Personally appeared the within mentioned M^rs Anne Wentworth Before me and acknowledged that she voluntarily and uncompelled by her Husband as her free act and deed.



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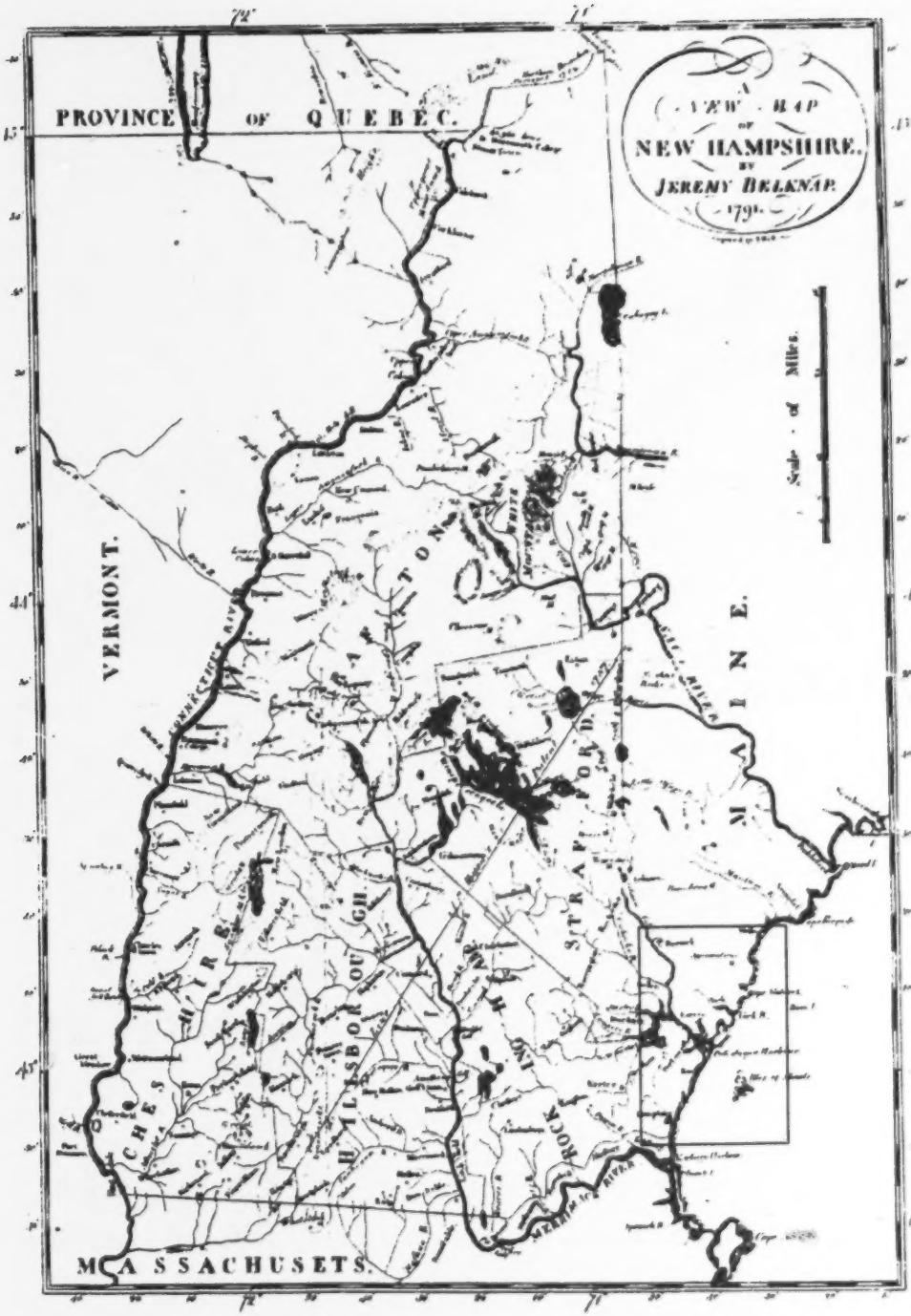
A
VIEW · MAP
OF
NEW HAMPSHIRE.
BY
JEREMY BELKNAP.
1791.
PROVINCE OF QUEBEC.
VERMONT.
MASSACHUSETS.
MAINE.
Scale of Miles.
CHESHIRE
HILLSBOROUGH
STRAFFORD
ROCKINGHAM

R Berwick.
Agumenticus
M.
Dover.
York.
Cape Ned
R.
am.
Kittery.
York R.
Portsmouth
Pascataqua Harb
Stretham.
Rye
Isles of
Hampton
Salisbury.